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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, *et al.*,

*Appellants,*

—against—

JOHN MONTGOMERY, Director of the State Department of Social Welfare of the State of California, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, THE ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL WELFARE RIGHTS ORGANIZATION, AND THE STATE OFFICE OF LEGAL SERVICES

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF *AMICI CURIAE*

Movants Center on Social Welfare Policy and Law, The Roger Baldwin Foundation, The National Welfare Rights Organization and State Office of Legal Services respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

1. The Center on Social Welfare Policy and Law is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the Columbia University School of Law, the Center undertakes research pertaining to the legal rights of welfare recipients and supports OEO-funded legal services

programs and other legal organizations through education and assistance in the preparation of important litigation. In this capacity the Center has rendered substantial assistance in most of the cases challenging substitute father rules found in public assistance statutes and regulations. The Center filed an *amicus* brief with the District Court on Appellants' unsuccessful motion for a rehearing. The Center has also appeared before this Court in two arguments this term (*Goldberg* v. *Kelly*, No. 62, and *Rosado* v. *Wyman*, No. 540) and has submitted briefs *amici curiae* in *King* v. *Smith*, 392 U.S. 309 (1968); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Simmons* v. *Housing Authority of West Haven*, O.T. 1969, No. 81; *Boddie* v. *Connecticut*, O.T. 1969, No. 265; *Sanks* v. *Georgia*, O.T. 1969, No. 266; *Wheeler* v. *Montgomery*, O.T. 1969, No. 14; and *Dandridge* v. *Williams*, O.T. 1969, No. 131. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals. The Center, together with the federally funded legal services programs throughout the nation, has a vital interest in presenting to this Court the full range of issues raised and rules affected by this case.

2. The Roger Baldwin Foundation of the American Civil Liberties Union is a non-profit organization devoted to the furtherance of civil liberties and civil rights in all aspects of American life. The transformation of constitutional guarantees of free speech, rational classification, and due process into meaningful protection to needy persons dependent upon the State for their support has been a particular concern of the Foundation and led to its participation as counsel of record in *King* v. *Smith*. The Foundation's concern that has led to its participation in this brief is the

result of the use of rules, such as California's, the effect of which is to circumvent *King* v. *Smith*.

3. The National Welfare Rights Organization was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and teach individuals in need of financial assistance how to secure public assistance benefits. The membership of the National Welfare Rights Organization includes more than 30,000 households organized in 200 affiliated groups in 70 communities in 37 states. Since many of its members have been and continue to be adversely affected by arbitrary income assumption rules, which are contrary to the reality or existence of such income, the organization has devoted much of its energies and resources to the abolition of such arbitrary rules.

4. State Office of Legal Services is the State-wide Appeals Division of Legal Service Programs in the State of New Jersey who have the responsibility of coordinating efforts of the local legal services offices in appealing cases which challenge policies or statutes that adversely affect the poor in the State of New Jersey. The outcome of the instant appeal will have a direct effect upon the applicable statute in New Jersey (see Appendix).

5. Counsel for Appellees, though not having any objection to the filing of this brief *amici curiae*, expressed a preference for this brief to be presented to this Court by Motion as opposed to Stipulation.

6. *Amici* wish to present to the Court, in the interest of providing as complete and relevant a discussion of the very

important issues here (in view of the impact on the financial security of thousands of recipients and applicants around the country), further amplification of the statutory argument discussed in Appellants' brief. Appellants' development and argument of the due process and equal protection Constitutional issues involved in this appeal are competently and fully discussed in their brief and therefore this brief is limited to the statutory issue. To avoid repetition we shall attempt to omit arguments raised in Appellants' brief and the United States Government's *amicus* brief filed with the Court.

WHEREFORE, Movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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## BRIEF *AMICI CURIAE*

## ARGUMENT

### I.

**A state may not assume contrary to fact that a non-parent is supporting a needy dependent child and thereupon deny, terminate or reduce aid.**

Title IV of the Social Security Act, 42 U.S.C. §601, establishes two basic eligibility criteria for determining whether a child qualifies for Aid to Families with Dependent Children (AFDC) benefits: 1) Is the child "needy" and 2) is the child "dependent," i.e., "deprived of parental support

or care by reason of the death, continued absence from the home, or physical or mental incapacity of the parent." 42 U.S.C. §606.

State-imposed restrictive definitions of these two terms have caused otherwise needy dependent children to be declared ineligible for, or to have their benefits reduced or denied under AFDC. Alabama's definition of "dependency" was at issue in *King* v. *Smith*, 392 U.S. 309 (1968). Alabama law declared ineligible for AFDC benefits children whose mother cohabited with any able-bodied man. Reasoning that such a man was a "substitute father" within the meaning of the federal statute, Alabama denied any aid to a child in such a home since it lacked an absent "parent" and therefore the child was not "dependent." This Court rejected this analysis and noted that under Alabama law a "substitute father" was not among those legally obligated to support the child.

The Court went on:

> The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: 1) that the man did not in fact support the child; and 2) that he was not legally obligated to support the child . . . We think the answer is quite clear; Congress must have meant by the term "parent" an individual who owed to the child a state imposed legal duty of support. 392 U.S. at 329.

After *King* v. *Smith* was decided, the Department of Health, Education and Welfare (HEW), the federal agency

responsible for administering[1] the Social Security Act, issued a regulation[2] implementing the decision in *Smith*. The regulation required, in order for a state plan to be in conformity with the Act, that only income or resources of men-living-in-the-house in fact available on a regular basis may be taken into consideration in determining the budgetary needs of eligible children. California admittedly is not in conformity with this regulation.[3]

"Need," on the other hand, was at issue in *Solman* v. *Shapiro*,[4] and is at issue in the instant appeal. "Need," for purposes of determining both eligibility and the amount of benefits, is derived by subtracting currently available income and resources from the state-determined standard of need. In determining the amount of resources available, both Connecticut and California indulge in an irrebuttable presumption, often contrary to fact, that a stepparent

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[1] 42 U.S.C. §1102.

[2] 45 C.F.R. §203.1(b), which reads in pertinent part:

> "The inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in paragraph (a) [natural or adoptive parent or stepparent who is legally obligated to support the child under State law of general applicability] of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. • • • In the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, *only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.*" [Emphasis added.]

[3] See Memorandum Opinion of District Court in Appellants' Jurisdictional Statement, Appendix A.

[4] 300 F. Supp. 409 (D. Conn. 1969), *affirmed per curiam*, —— U.S. ——, 38 U.S.L.W. 3125 (No. 215, Oct. 14, 1969).

(and in the case of California, an unrelated male) present in the home of a child is contributing regularly and adequately to the support of that child. Thus, in determining need, the pertinent Connecticut statute required that "the income of a stepparent shall be considered as available for the support of the . . . stepchild," even though not in fact so available and even though Connecticut does not have a state law of general applicability imposing an obligation on a stepfather to support his minor stepchildren. The three-judge district court in holding that Connecticut's statute clearly contravened the federal regulation against assumption of income noted that the stepfather is neither a "relative claiming aid"[5] nor an "essential person"[6] and that the stepfather is not a "parent"[7] since he is neither the natural or adopting father nor does he have an obligation of general applicability under Connecticut law to support his minor stepchildren, 300 F. Supp. at p. 415. Rather, he was one of those persons whose income could not be assumed to be available to the child under valid federal regulations.

California's approach to determining "need" of admittedly "dependent" children is similar to Connecticut's. California seeks to distinguish its approach from Connecticut's on the basis of a statute,[8] which establishes a

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[5] 42 U.S.C. §602(a)(7). This is because he is not the caretaker of the needy child, and, of course, a stepparent or MARS is not eligible for assistance in his own right under AFDC.

[6] *Ibid.*—As developed *infra*, an "essential person," must consent to being included in the family budget since the state includes his income in determining the needs of the total family.

[7] 45 C.F.R. §203.1(a).

[8] California Welfare & Institutions Code Section 11351, set forth in the Appendix. On November 10, 1969, §11351.5 became effective,

"welfare" obligation on stepparents and unrelated males assuming the role of a spouse (MARS) to support their stepchildren or the children of the woman living in the house.[9] In effect, California is determining when a child is deprived of parental support with reference to its own special rules of legal obligation to support, applicable only to "substitute parents" of AFDC families. But if a state may do this, then it has license to define and redefine "parent" as that term is used in the Social Security Act. That is to say, the *sine qua non* for eligibility for AFDC is the deprivation of the support of a "parent." Were "parent" to mean any legal obligation to support and include the special legal obligations involved herein, the requirements of the Social Security Act spelled out so carefully in *King* v. *Smith* would be illusory. Under this reasoning Alabama's fault in *Smith* and Connecticut's fault in *Solman* were merely the technical failure to impose its own legal obligation of support on those whom it deemed to be substitute fathers of AFDC children. Surely the economic protection of needy dependent children cannot be so easily avoided. California's approach represents the classical distinction without a difference since the statute is not enforced,[10] nor could it be enforced against the step-

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purporting to treat man-assuming-the-role-of-spouse (MARS) in a different manner than stepparents. New regulations have been proposed pursuant to the new statute, but not implemented, and the old regulations implementing §11351 are still being applied to MARS. §11351 continues to apply to stepparents without change. See Appellants' Brief, Appendix H.

[9] In California, §11351 stepparent and §11351.5 MARS obligation is triggered only if the child seeks welfare.

[10] Rosen, *Enforcement of California's Man-Assuming-the-Role-of-Spouse* Statute: Empirical Findings (May 1969) (printed in Sparer, *Materials on Public Assistance Law*, Univ. of Penn. L.

parent or MARS for the benefit of the family.[11] But assuming, *arguendo,* that California's statute does establish an enforceable legal obligation of support, it is the contention of *Amici* that the statute is impermissible because *King* v. *Smith* and *Solman* v. *Shapiro* are controlling and, in addition, the statute violates valid HEW regulations, issued by the federal agency responsible for ensuring proper compliance with the Act and safeguarding and effectuating the rights of recipients.

## II.

**There are three classifications of persons living in the home, only one of which, a "parent," has the characteristic of assumption of income.**

To fully understand how California's approach visits needy, dependent children with the same kind of vengeance as the impermissible approaches taken by Alabama and

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Sch., Reginald Heber Smith Community Lawyer Fellowship Program (unpublished, summer 1969), v. 1, pp. 5-132 to 5-143; a study conducted by Yale Law Journal in March 1968 in which the ten California counties with the largest welfare populations indicated it was *not* their practice to enforce §11351 against the MARS for the benefit of needy children by use of court action, but relied upon the threat of or prosecution through the welfare fraud statutes.

[11] In an increasingly mobile and transitory society of which California represents a prominent example, the mere removal of the MARS from the relationship in the house would make the legal obligation of support unenforceable. See also *People* v. *Owens,* 231 Cal. App. 2d 691, 697, 42 Cal. Reptr. 153, 157 (1965) which expressly held that a non-adopting stepfather was not required by §11351 of the Welfare & Institution Code and regulations promulgated thereunder to support his stepchildren.

Connecticut, thereby denying the economic protection of such children as required by the Act, it is important to identify 1) who is and who is not a "parent" under the Act, and 2) under what circumstances income may be "assumed" to be available.

"Parent" in 602(a) and in other sections of the Act refers only to a natural or adoptive parent or a stepparent who is legally obligated to support the child under a state law of general applicability,[12] 45 C.F.R. §203.1(a), *King* v. *Smith*, 392 U.S. at 329. The reason Congress limited the category "parent" to those who have a well recognized, full-fledged and stable obligation to support and, in addition, have the natural or voluntary bond of affection to so support such children, is not hard to find. As this Court developed in detail in *King* v. *Smith*, Congress in establishing the AFDC category was distinguishing between two groups of needy children—those whose need arises from the unemployment of a "parent" (and referred to as a "breadwinner," "wage earner," or "father"), and those whose need arises from the absence, death, or incapacity of the "breadwinner," "wage earner" or "father." Only the needs of the latter group, characterized in the original house report as "one clearly distinguishable group of children," H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935), and in the Act as "dependent" children, were to be relieved under the AFDC program; the needs of the former, representing a stable family, would be met by employment programs for fathers. As the court further said in *King* v. *Smith, supra*, "to describe the sort of 'bread-

[12] General applicability refers to the enforceable obligation and duty of a stepparent to support his stepchildren in non-welfare as well as welfare situations.

winner' [Congress] had in mind, [it] employed the term 'parent.'" *King* v. *Smith*, 392 U.S. at 328, 329.

The use of the term "parent" in other sections of the Act makes even clearer the narrow definition of "parent." Thus Section 402(a)(10), enacted in 1951, requires a state to provide prompt notice to law enforcement officials "in respect of a child who has been deserted or abandoned by a 'parent.'" 42 U.S.C. §602(a)(10). The "parent" whom this provision requires to be reported to law enforcement officials is surely the same parent whose desertion makes a child eligible for AFDC assistance in the first place. And Congress obviously did not intend that a so-called "parent" who has no legal duties of support, *Smith*, at 330, 331, beyond a supposed obligation to the children of others while cohabiting [but not afterwards] was to be referred to law enforcement officials. MARS and stepparents are simply not deserting or abandoning parents, as those terms are commonly understood, for the very purpose of such referrals is to institute non-support proceedings.[13] See HEW Handbook of Public Assistance Administration (Handbook) Pt. IV, §§8100-8149. Similarly, the 1967 Amendments to the Social Security Act provide that as

[13] The long-standing reality under the laws of forty-nine states and the District of Columbia is that only natural and adopting fathers have a legal obligation and general duty of support of their children. The various states that have special so-called legal obligations to support of stepparents and substitute fathers were developed since the Act of 1935 and are found only in the welfare law of such states as an exception to their general applicable support laws. Thus California's so-called obligation to support of stepfathers and MARS is an exception to its domestic relations law, Calif. Civil Code Section 209.

The State of Washington passed Section 26.16.205 of the Domestic Relations Statute in 1969 imposing a general duty of support on stepparents, whether living in or out of the home, of their stepchildren, as long as they are married to the mother.

regards any child receiving aid who has been deserted or abandoned "by his parent," the states must establish a program to secure support for such child from such parent. 42 U.S.C. §602(a)(17). Also, states are required to report to HEW any "parent . . . against whom an order for the support and maintenance of such [dependent] child . . . has been issued by" a court, if such parent is not making the required support payments. 42 U.S.C. §602(a)(21). Still another amendment requires the states to cooperate with HEW in locating any "parent" against whom a support petition has been filed in another state, and in securing compliance with any support order issued by another state. 42 U.S.C. §602(a)(22).

As the Court said in *Smith*, the "pattern of this legislation could not be clearer." 392 U.S., at 332. The provisions seek to secure "parental" support in lieu of AFDC support for dependent children. Children with alleged substitute parents not actually subject or subjected to judicial support orders are entirely unprotected by these provisions. *Ibid.*

To be distinguished from "parent" is the classification "essential person." Although the Act does not mention essential persons, it soon became apparent that the presence of certain persons in the home was advantageous or essential to the well-being of children furnished aid under the Act. Thus the Department formulated the long-standing[14] policy of permitting states to include, in computing the needs of a person eligible for assistance, the needs of another person (or persons) living in the same home

[14] HEW Handbook, Part IV, §3131(3), 1964, renumbered §3131(4) in 1965. See also Appellants' Jurisdictional Statement, Appendix H, last exhibit, Letter of Manson W. Wilcox, General Counsel's Office of the Department of Health, Education & Welfare, addressed to Thomas K. Gilhool.

whose presence was deemed essential to the well-being of the recipient. The presence of such a person (e.g., the older ineligible brother of a needy dependent child or a stepparent) was deemed to be so related to the welfare of the recipient that the financial cost of achieving the result was considered part of the recipient's need. Given the basis for this policy, the decision as to whether a person was essential or not was left to the applicant or recipient in the individual case. This administrative policy was expressly approved by Congress and incorporated into 42 U.S.C. §§602(a)(7) and (8) as a part of the 1967 amendments to the Social Security Act.

Also to be distinguished from "parent" are "other persons." 45 C.F.R. §203.1(b). Simply stated this refers to persons, including relatives, who might contribute to the family. To the extent that such persons do contribute, in fact, on a regular basis, such income must be taken into consideration by the Welfare Department in determining family need. *Ibid.*

Certain characteristics flow from these classifications, one of the most important being "assumption of income." HEW has a general policy against the assumption of income or resources (except those of a natural or adopting parent residing in the household). Under this policy it is the availability, in fact, of income, and not the possibility of obtaining it because it is said to legally exist, which is controlling. This policy finds expression in Section 3131(7) of Part IV of the HEW Handbook, in force since 1966, which provides that no income may be assumed or included in determining need unless it is "in fact, available . . . for current use on a regular basis." This Court gave approving reference to this regulation in *King* v. *Smith* when it found

that the regulation "properly excludes from consideration resources which are merely assumed to be available to the needy individual." 392 U.S. 309, 319, n. 16 (1968). Subsequent to *King* v. *Smith* as noted above, a more specific regulation was promulgated by HEW applicable to substitute fathers because various states refused to conform to HEW's general policy in this regard and had singled out these persons in applying their assumption of income statutes and regulations.[15]

One reason for the concern about assumption of income becomes apparent when viewed in the context of the purposes of the AFDC program: ". . . to help maintain and strengthen family life" and "furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living" (Social Security Act of 1935, §401, 42 U.S.C. §601). As this court made abundantly clear in *King* v. *Smith*, the overriding concern of the AFDC program was the economic security and well-being of dependent children deprived of the support of the parent. "Protection of such children is the paramount goal of AFDC" (392 U.S. 309, 325).

Thus, only a "parent" *living in the home* has his income "assumed" to be available to his children. Economic protection of needy children is consistent with allowing a state to assume the income when the "parent" is living in the home because there are present numerous safeguards to ensure this protection, including a state-imposed general legal duty of support, the natural or voluntary bond of affection between the parent (i.e., natural or adopting father) to so support his child, as well as en-

[15] *Ibid.*, Letter of Alanson W. Wilcox.

forceable and enforced civil and criminal sanctions should the support not be forthcoming.

In sum, Congress has consistently been concerned with ensuring meaningful protection to such class of children as demonstrated by a wide variety of provisions which include: that all persons have an opportunity to apply, so that aid be furnished promptly "to all eligible" children, 42 U.S.C. §602(a)(10); that a hearing be provided to challenge any denial or limitation of aid, 42 U.S.C. §602(a)(4); that the program be uniform throughout the state, 42 U.S.C. §602(a)(3) and that aid may not be denied children in unsuitable homes unless the state makes provision for them elsewhere, 42 U.S.C. §602(5).

The statutory theme could not be clearer: protection of needy children was not just a phrase, but a goal that, in order to be reached, required definitive avenues and boundaries. As a result of its many decades of administrative experience in this area, HEW has acquired the precise expertise necessary to define the appropriate avenues and boundaries required in order to ensure the implementation of Congressional intent.

## III.

**The HEW regulation restricting the assumption of income is a valid expression of broad rule making power necessary to implement congressional intent expressed in the Social Security Act.**

As is noted in Point II, HEW has a strong policy against the assumption of income of a non-parent whether living in or out of the house. That this non-assumption of income rule is a proper exercise of rule-making authority under the Act and that the subject which it regulates goes to legitimate federal concern cannot be doubted. The statute requires a state agency in its state plan to take into consideration, "in determining need, any other income and resources of any child or relative claiming aid to families with dependent children," 42 U.S.C. §602(a)(7). This is the provision erroneously relied upon by the District Court below when it declared HEW's regulation and not California's statute had failed to conform to the Act. Plainly this provision commands consideration of *available* income and resources *of the child or relative* claiming aid, but, equally plainly, it does not command consideration of other income and resources *not* available to the child or relative. It is the "other income and resources *of* any child or relative which are to be considered. The statutory directive of §602(a)(7) on its face thus contemplates rules for determining when income and resources are *"of a child or relative."* Being a federal dictate imposing requirements of a State plan, the federal rules decreed are formulated by the agency charged with

the responsibility of approving and verifying compliance of State plans with the Federal statute.[16]

Thus, HEW's administrative experience under the AFDC program has resulted in specific prohibitions in order to provide the required economic security to needy children. A state may not include support payments of the natural father living outside the house, even where they are the subject of a court order, unless they are in fact made on a regular and continuous basis. Handbook, Pt. IV, §3120. The existence of a court order itself does not guarantee regular payments from an abandoning or deserting spouse, and HEW accordingly requires some other assurance, such as payment directly to the welfare department. Handbook, Pt. IV, §3124. Similarly, a state may not budget contributions from relatives generally, even where such persons have been determined able to make them, unless they are in fact made on a regular, continuing basis. Handbook, Pt. IV, §3120. This is true whether the relative is a person living in or outside the AFDC home and regardless of whether the relative is said to have a "welfare" obligation to support the child. Where the relative or other person with income is living in the same home as the recipient of AFDC, this policy is assured by the "essential person" doctrine, now statutory, which, as noted above, allows the needs and income of such person to be budgeted in the AFDC budget only where the recipient so selects or where the income

[16] See e.g. *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938) (a well established pattern of practice or administration bears a presumption of consistency with the governing statute). The words "income and resources *of a child* or relative" are "not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation." *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941).

is proven to be available. These rules of course do not render the states impotent to deal with the income of persons said to be liable for support. They merely specify the manner in which states must ascertain and obtain such income, at least as it affects needy children entitled to AFDC benefits. Thus another HEW regulation directs states to *develop* potential sources of revenue, such as OASDI benefits, but not to assume them. Handbook, Pt. IV, §3140.5. Under these rules states are quite free to pursue the income of anyone on whom they impose a legal obligation of support to defray welfare costs. Assumption is simply not the way to pursue the income.

The validity of the assumption of income and resources and the regulations implemented to restrict it, is a subject transcending state boundaries to be dealt with by HEW in light of national experience. Of course any restrictive rule on income saves money, but the states were not granted autonomy under the Social Security Act to conserve resources in any manner they saw fit. It is the use of federal money by the states in the service of federal goals which is controlling here. Plainly HEW may define the circumstances in which a state must establish the actual availability of income rather than assume it before deducting income from or denying outright a subsistence grant covering basic and fundamental needs of dependent children.

## IV.

**A stepparent or MARS in California is not a "parent" and his income may not be assumed to be available to needy children in the house unless it is, in fact, available.**

As illustrated by California, some states treat stepparents and men in an AFDC household as "parents" or actual supporters of needy children, and all of their income, less a welfare budget for themselves and their own children, is deemed available to the AFDC family. But it was precisely this practice that HEW condemned in its specific regulation issued in the wake of *King* v. *Smith*. Specific expression by HEW of the general policy against assumption was necessary because, although there was little overt controversy over the rules governing assumption of income generally, the states could not resist different treatment of the man-in-the-house.[17] The reasons for this treatment are not hard to find: In the case of the MARS there is moral antipathy to his relationship with the mother; and there is an equally potent antipathy to allowing either a non-married or non-adopting male, thought to be enjoying the privileges of marriage or fatherhood without the concurrent obligations, to be in a better position regarding support than a natural or adopting father. And, of course, these restrictive definitions, like all such rules, reduce welfare costs.

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[17] At the time of *King* v. *Smith*, 12 states had budgetary (or assumption of income) rules, Pollock, 14 Welfare L. Bull. 19, 23 (Sept. 1968). At the present time, at least 7 states continue to use budgetary rules. See Appendix.

As developed above, California's budgetary treatment of stepparent and MARS income is defended by the existence of a special "welfare obligation" to support an AFDC family imposed on stepparent and MARS, but only as long as they cohabit with the family. It is said that this legal obligation to support, by itself, renders the income a resource of the children and relative claiming aid, notwithstanding that this is plainly inconsistent with the approach taken towards all other persons, including absent fathers and relatives with an obligation to support; and notwithstanding that this was contrary to the actual experiences of appellants that were ignored by the Welfare Department. A simple fact seemingly ignored by California is that appellants are not attempting to obtain welfare benefits in addition to money available from men-in-the-house. Whatever income the man-in-the-house possesses is simply not in fact available to the needy children.[18]

California's and the District Court's error arises from their confusion of "parent" as that term is used in §402(a) of the Social Security Act, 42 U.S.C. §602(a). Men-in-the-house, including stepparents and MARS, in California are

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[18] For other examples of statutory restrictions based on legal definitions having no basis in fact and depriving needy children of economic protection, see *Damico, et al.* v. *State of California et al.* (N.D. Calif., Sept. 12, 1969), 2 Pov. L. Rptr. ¶10,478 where a three-judge court held that a statute requiring a 90 day waiting period in order to determine a continued absence of a parent from the home, before a recipient could obtain AFDC benefits, was invalid as a violation of §406(a) of the Social Security Act; and *Anderson* v. *Burson*, 300 F. Supp. 401 (N.D. Ga., April 5, 1968) where a three-judge court required the State to carry the burden of showing there was suitable employment available and a bona fide job offer made to an AFDC mother when it declared inapposite Georgia's "employable mother" regulation which had placed the burden on the recipient to establish that employment is not available.

not "parents" under §602(a), even where there is a so-called welfare obligation to support. "Parent" in 602(a), as developed earlier, refers only to a natural or adopting parent or father, who has a well recognized, full-fledged and a stable obligation to support his children or a stepparent who is legally obligated to support the child under State law of general applicability.

In *King* v. *Smith*, this Court was dealing with a man having intimate relations with the mother in the house but who was without any form of legal obligation of support under Alabama law. Hence the Court at times used the term "parent" and legal obligation of support interchangeably, though it also stressed absence of support in fact. 392 U.S. 309, 319 n. 16. But, and this is crucial, *King* v. *Smith* does not say that any person or man said to be bound or obligated to support another's child was a "parent" within the Social Security Act. To so do would, as noted above, render the decision in *King* v. *Smith* illusory.

Just as the Court found in *Solman*, California's stepparents and MARS are neither natural or adoptive parents nor stepparents with an obligation, under a state law of general applicability, to support their stepchildren, but are "other persons" who have the *potential* to contribute to the needy family.

California's approach regarding the assumption of income differs from HEW's approach regarding the likelihood of the existence of such income. But California is not charged with the responsibility of administering the Social Security Act so as to carry out its purposes and ensure the economic security of needy children. HEW is, and has determined, through its three and a half decades

of experience, that California's approach is contrary to ensuring the economic security of needy dependent children.

## CONCLUSION

The Court should hold that non-parent assumption of income statutes and regulations violate the Social Security Act and the Fourteenth Amendment and uphold the validity of 45 C.F.R. §203.1, the relevant federal regulation. The decision below should be reversed.

Respectfully submitted,

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# APPENDIX

## APPENDIX

### I. CALIFORNIA WELFARE AND INSTITUTIONS CODE.

*Section 11351* (stepparent)

Where a needy child lives with his mother and a stepfather • • • the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather • • • The county granting aid shall determine if the stepfather • • • is able to support the child either wholly or in part. *The determination shall be based upon a standard* which takes into account the stepfather's • • • income and expenses *under regulations adopted by the department.*

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather • • • is bound to support, if able to do so, his wife's children if without support from such stepfather • • • they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section • • •

*Section 11351.5,* effective Nov. 10, 1969 (MARS)

Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribu-

tion to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.

The minimum financial contribution to the family shall be determined in accordance *with standards established by the department* which takes into account such adult male person's income and expenses. The regulations formulated by the department shall require the mother of the children and the unrelated male to present all of the facts in connection with the sharing of expenses which comprise the agreement whereby said adult male resides with the family. The conditions of the agreement and the facts related to the sharing of the family expenses shall be signed under penalty of perjury by both the mother of the child and the unrelated male. In the event that either the mother or the adult male person wilfully and knowingly fails to cooperate during the period such joint sharing of expenses arrangement exists in setting forth all the facts in accordance with provisions of this section, aid to the family may be discontinued.

The provisions of this section do not apply to a bona fide paying lodger, roomer or boarder living in the home of a family applying for or receiving aid under this chapter. (Emphasis added.)

## II. OTHER STATES WHICH IRREBUTTABLY ASSUME THE INCOME OF THE MAN IN THE HOUSE TO BE AVAILABLE.

1. *Arizona Revised Statutes, Sec. 8—§46-294, Amount of Assistance,* effective July 1, 1969 (Stepparent & MARS)

The amount of assistance which a recipient may receive shall be determined in accordance with section 46-207, except that the income of any adult, whether or not related to the family, who lives with and as a member of the family and whose needs are included in computing the assistance payment and who shares in the benefits of the assistance payment, shall be considered as income to the family. For purposes of this title only, the income of an unmarried son or daughter under twenty-one years of age shall be disregarded to the full extent permitted under the federal Social Security Act.

2. *New Hampshire Revised Statutes Annotated §167:2-b*
[*New*] *Employment of Relatives of Persons Receiving Aid to Dependent Children or Public Welfare Assistance,* effective Sept. 1, 1969 (Stepparent & MARS)

No person who is otherwise eligible for aid to dependent children or public assistance based on financial need shall receive public welfare assistance from the state unless and until all able-bodied adult males, under the age of sixty-five years, except those regularly attending school, related to such person, and

regularly residing in the same household as such person, and legally liable to contribute to the support of such person and not prevented from maintaining employment and contributing to the support of such person by reason of physical or mental disability or other substantial or other justifiable cause, are employed on a full-time basis. The amount or amounts earned by the persons obliged to maintain employment hereunder shall be taken into consideration in determining the level of need for aid to dependent children or public assistance. Nothing in this section shall be so construed to deny to any minor dependent child any needed aid to dependent children or public assistance to which he would be otherwise entitled. *Unrelated adult males living in the same household in loco parentis as to any such person seeking aid to dependent children or public assistance shall be obliged to contribute to his or her support to the same extent as the father of such person, and in default thereof, shall be subject to the same penalties as the father of such person would be in such case. If anything in this section conflicts with federal law or regulation related thereto, the federal law or regulation shall take precedence.* (Emphasis added.)

3. *New Jersey Welfare Manual, Part II, §§2330.1 (a) & (b)*

2330. PERSONS INCLUDED IN ADC GRANT IN RELATION TO RECIPIENT COUNT (Stepparent & MARS)

.1 State Policy

a. Family Budget Unit Concept

As provided in the Categorical Assistance Budget Manual, the income and resources of all members of a family budget unit shall be recognized as income and resources applicable to the requirements of the family budget unit.

Under the prescribed budgeting methods the *total* requirements and income of all members of the family are budgeted even though some members are not personally eligible to receive ADC payments (e.g., certain persons living with natural or adoptive parent in non-marital relationship, and ineligible dependent children).

b. Persons Eligible to Have Requirements Included in ADC Grant

In addition to the requirements for the eligible child(ren) (as defined in 2280.2), the requirements of the following persons (when not separately eligible for AB, DA or OAA) shall be included in the grant:

1) The natural or adoptive parent(s) or needy parent-person;

2) The natural or adoptive parent and stepparent;

3) The needy parent-person and spouse.

4. *New York, 18 N.Y. C.R.R. §353.3 (a)(2)(i) in part*: (Stepparent & MARS)

All available and unrestricted income of an applicant or recipient and of the spouse, if in the home . . . shall be pro-rated and applied against the needs of the applicant, the spouse and the minor children of either or both. If the spouse is possessed of income but, under exceptional circumstances, refuses to make application for assistance and to have his income so applied against the needs of his family, *the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents.* (Emphasis added.)

5. *Oklahoma Public Assistance Manual, §336.2* (MARS)

A child living with an own parent is not deprived by reason of absence from the home if there is in the home a person who has assumed the role of the parent's spouse and whose income is available and sufficient to meet the needs of the child according to the budgetary standards of the Department.

6. *South Dakota, Manual of Department of Public Welfare, Chapter III-5A-17.3,* July 1, 1969 (Stepparent)

*Income of Parents or Stepparents of Children in Families Receiving ADC.* If the dependent child or children are living in the home of their parents (mother, father or stepparent), then the net earned

income derived from labor or business by those parents is to be considered available to and deductible from the requirements of the dependent child or children to the extent that such income exceeds the requirements of those parents and other children in the household who are dependent upon either parent for their support and who have not attained the age of 21 years, all of which is to be figured on the assistance standard. In a stepparent situation, only that net income received after deduction of support payments actually being made to children from a previous marriage shall be considered deductible. (See III-5A-16, Exempt Income.)

7. *Tennessee, Welfare Manual, Vol. II, p. 346, Para. IV-4,* effective 9-1-69 (Stepparent)

If the mother has remarried and her husband is able-bodied, *AFDC* can *be granted* for the child of the mother's former marriage, or the child born out-of-wedlock, who also shares the home *only if the husband* is contributing to the support of his children who live elsewhere, and his *income is insufficient, according to assistance standards, to support his stepchild after payment is made to his own children.* If he does not contribute to his own children out of the home, AFDC may be approved and/or continued for a period not to exceed 6 months, following marriage, provided his income plus other income in the home is insufficient to meet the needs of the family according to assistance standards.

*Tennessee, Welfare Manual, Vol. II, p. 402, §1*

The AFDC aid group, in addition to the children for whom AFDC is being requested, *shall* include the parents (natural, *step* or adopted) *who live in the home,* except when the parent is eligible for or receives PA in his own right or has his needs included in the budget of another PA recipient. (Emphasis added.)

III. STATE WHICH REBUTTABLY ASSUMES INCOME OF THE MAN IN THE HOUSE TO BE AVAILABLE.

1. *Washington, Welfare Manual, Vol. II, page 8, §8.54* (MARS)

When an adult male person living with a child and its mother is not married to the mother it shall be the role of spouse to the mother unless reasonable presumed that the adult male person is assuming proof to the contrary is presented by the mother and the adult male person within 30 days of application for assistance.

Unless the presumption is removed the income and resources of the person assuming the role of spouse shall be deemed available to meet the requirements of the child and the mother in the same manner as the income and resources of a natural or adoptive parent. See Section 8.847 and 8.83.